Petition

81-1367

No. ———

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

HELEN BAILEY FRIERSON - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the state court violated the Petitioner's due process rights by refusing to bifurcate the penalty enhancement portion of her trial from the trial in chief.

II. Whether the Petitioner's due process rights were infringed when her conviction was based on insufficient evidence.

III. Whether the trial court erred in overruling Petitioner's motion to suppress evidence seized in violation of her Fourth Amendment rights.

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IN THE

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No. _____

HELEN BAILEY FRIERSON - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The Petitioner, HELEN BAILEY FRIERSON, respectfully prays that a Writ of Certiorari issue to review the Order and Opinion of the Court of Appeals of Kentucky entered in this proceeding on August 14, 1981, and the Supreme Court of Kentucky's denial of her Motion for Discretionary Review on November 17, 1981.

OPINION BELOW

The Opinion of the Court of Appeals of Kentucky (in case number 81-CA-318-MR) was rendered on August 14, 1981 and modified on August 21, 1981 and was not a published opinion. That opinion may be found in Appendix A. The Supreme Court of Kentucky entered an order on November 17, 1981 denying Petitioner's Motion for Discretionary Review (Appendix B).

JURISDICTIONAL STATEMENT

On August 14, 1981 the Court of Appeals of Kentucky entered an opinion and order affirming Petitioner's conviction. Petitioner's Motion for Discretionary Review to the Supreme Court of Kentucky was denied by order of that court on November 17, 1981. This court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> . . . (N)o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

The Fourth Amendment to the Constitution of the United States as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The Petitioner was indicted, tried and convicted of Trafficking in Preludins, a Schedule Two Non-narcotic pursuant to Kentucky Revised Statutes (K.R.S. 218A.-140(1), in the Jefferson Circuit Court, Twelfth Division, Louisville, Kentucky, the Hon. Judge Curtis G. Witten presiding. The verdict was rendered by the jury on September 23, 1980 and a sentence of six years in the penitentiary was recommended. The Petitioner's conviction was appealed and was affirmed by the Court of Appeals of Kentucky on August 14, 1981. (Appendix A). Petitioner's subsequent Motion for Discretionary Review to the Supreme Court of Kentucky was denied on November 17, 1981. (Appendix B).

The charges against the Petitioner were based on drugs allegedly obtained when two search warrants were executed on a house located at 217 Northwestern Parkway in Louisville. One was executed on or about November 28, 1979 and the other was executed on or about January 3, 1980. In November, the Officers allegedly found ten (10) Preludins in a kitchen drawer, one Marijuana cigarette in the living room and some cash. During the search in January of 1980, the Officers testified that they found a foil packet containing five (5) Preludins on the kitchen floor, forty-five (45) Preludins in a sock in a potato sack on the back porch and a bag of Marijuana in the garage.

Prior to her trial, the Petitioner moved the trial court to suppress the fruits of the search allegedly

made on her residence as being made without probable cause. During jury selection, counsel for Ms. Frierson stated at page seven of the Transcript of Evidence (Hereinafter referred to as T.E.) ". . . I'm going to make a motion to suppress as to count one and as to count two . . ."

After the jury was sworn, they were excused for a recess so that a hearing on the motion to suppress might be held. The pertinent pages of the trial transcript are included in this Petition as Appendix C. The court overruled the motion to suppress.

The Petitioner objected to the "enhancement" portion of the trial not being separate from the case in chief. KRS 218A.990(2) provides that upon the conviction of a second or subsequent offense of trafficking, a greater penalty is assessed against the defendant. The state must prove it is a second or subsequent offense and thus may introduce evidence of a prior unrelated offense in the case in chief when it is ordinarily not admissible. The Petitioner objected when the Clerk was called to testify about the prior offense and the objection was overruled.

> Mr. McCall: For the record, show my objection as to getting into this testimony in chief. This should be part of a bifurcated situation, because it denies my client the right to a fair trial.
>
> Court: What are you going to ask?
>
> Mr. Wilson: I'm going to ask her about a conviction.
>
> Court: Under this?
>
> Mr. Wilson: Under subsequent offender.

Court: You can do that, but you're not going to—

Mr. Wilson: (Interrupting) I'm going to ask her what she was charged with and what was the conviction.

Court: All right. (T.E. pp. 183-184).

Finally, Petitioner moved the court for a directed verdict of acquittal based on insufficient evidence to show trafficking. The proof, briefly, showed that all drugs allegedly found upon the execution of the search warrants were found in "common" areas of a boarding house. There was testimony that several people lived in that house and had access to those common areas. There was no clear link from the Petitioner to the drugs. The Petitioner's motions and the Court's rulings were made as follows:

Mr. McCall: I want to make a motion at this time, Judge, as to Count 1 and 2 of the indictment; that those charges of trafficking in a controlled substance, that the proof is insufficient and should not be submitted to the jury. It should be possession . . .

Court: Well, I overrule that. Go ahead, Mr. McCall, with your first witness . . .

Mr. McCall: I'm renewing all the motions I made at the close of the Commonwealth's case at the present time—at the close of the entire case, including motions for a directed verdict and all motions to set aside the swearing of the jury and all that.

Court: They are all overruled for the same reasons I gave you before . . . (T.E. pp. 190-191, 193, 252).

REASONS FOR GRANTING THE WRIT

I. The Petitioner was indicted as a subsequent offender under the Controlled Substances Act. In order to obtain an enhanced penalty under KRS 218A.-990, §(2), the Commonwealth must show that the Defendant has a prior conviction under the Controlled Substances Act. Ms. Frierson's position is that that portion of the trial ought to be bifurcated similar to the penalty portion in a Persistent Felony Offender trial or habitual criminal trial in order that the Defendant will not be prejudiced and denied his right to a fair trial.

When the Commonwealth called to the Circuit Court Clerk, the Petitioner objected and argued that a separate hearing ought to be held after guilt was established, if it was, on the present charges to determine whether or not the penalty ought to be enhanced due to a prior offense. That motion was overruled. Likewise, during the voir dire of the jury, the Petitioner objected to the court reading the indictment portion which stated that Ms. Frierson had previously been convicted under the Controlled Substances Act.

It has been recognized by the Courts and the legislature, as far as the Persistent Felony Offender statutes are concerned, that separate proceedings for the introduction of prior offenses are necessary to avoid

unfair influence upon the question of guilt or innocence on the primary offense. The fear is that the accused might be convicted of a crime because of past conduct and not because he committed the offense presently charged.

Petitioner firmly believes that the Persistent Felony Offender bifurcated procedure ought to be employed in enhanced penalty drug cases as well in order that she receive due process, i.e. a fair trial. In the present case, especially, its necessity is most apparent. Ms. Frierson had a prior conviction of Trafficking in Preludins, the exact same controlled substance involved in her present charges. The courts and the legislature have in the past recognized the potential prejudice that exists in such cases and has required such a hearing in Persistent Felony Offender cases. In the present case where the proof against the Petitioner was not overwhelming, it is obvious that it is prejudicial not to have such a bifurcated hearing regarding the penalty. Thus, the Writ ought to be granted.

II. The Petitioner was charged with Trafficking in a Controlled Substance rather than mere Possession of a Controlled Substance. Ms. Frierson is unsure why she was charged with Trafficking rather than Possession, except for the fact that the alleged informant accused her and/or a woman named HELEN with offering Preludins for sale. Obviously, the officers had no personal knowledge whatsoever of any sale or intent to sell. The only proof whatsoever regarding that matter was in the testimony of Detective Hise when he stated that on November 28, 1979, prior to the search

warrant execution, he went into the house located at 217 Northwestern Parkway under the pretense of being a drug buyer. He testified that Ms. Frierson would not sell him any drugs at that time.

Other than that testimony, there is no proof whatsoever that the Petitioner was engaged in Trafficking. Therefore, the most she should have been charged with was Possession of Controlled Substances.

Petitioner also believes, however, that there was insufficient proof to link her to the drugs allegedly found at the house at 217 Northwestern Parkway on November 28, and January 3. Thus, Petitioner made Motions for directed verdict at the close of the Commonwealth's case and at the close of the Defendant's case. Those motions were overruled.

During the execution of a search warrant on November 28, 1979, the items allegedly found were a packet of ten (10) Preludins in the kitchen drawer, a marijuana cigarette in the living room and One Thousand, Three Hundred and Eighty-five Dollars ($1,385.00) in cash in Petitioner's bedroom. Petitioner testified that the cash had nothing to do with the drugs as it was money recently withdrawn from Christmas Club bank accounts and the court subsequently ordered that money returned to the Petitioner. Therefore, proof against Ms. Frierson regarding the offense on November 28, 1979, was the (10) Preludin capsules in a kitchen drawer and one (1) marijuana cigarette in a living room ashtray. She believes that these items found in "common" areas of her boarding house were not sufficiently linked to her and therefore the court ought to

have directed a verdict of acquittal regarding that charge.

The items obtained during the January 3, 1980 search, were forty-five (45) Preludin tablets found in a sock in a potato sack on the back porch of the house, five (5) Preludin capsules found on the kitchen floor and a bag of marijuana found in the garage. Petitioner was found not guilty by the jury regarding the marijuana, but she believes that the court ought to have directed a verdict of acquittal regarding that charge at the close of the Prosecution's case. Likewise, there is no proof whatsoever that the capsules found in the sock on the porch or on the floor belonged to Ms. Frierson or that she even knew of their existence. The Commonwealth's theory appeared to be that since the Petitioner lived there, the items found must have been hers. It is obvious that there was insufficient evidence to link the Petitioner to the items allegedly found at the house on Northwestern Parkway and therefore the Trial Court erred in refusing to grant a directed verdict of acquittal.

Further, there is insufficient evidence to show that Ms. Frierson was "Trafficking" in a Controlled Substance. As stated above, the Petitioner had refused to sell any drugs to Detective Hise and only information on the affidavit supposedly given Detective Epperson by an informant indicated that the Petitioner was involved in Trafficking. As this Court well knows, a confidential informant is not subject to any investigation or cross-examination. Further, the information contained on the affidavit was not evidence to be con-

sidered by the court or by the jury in determining whether or not the Petitioner ought to be found guilty. Thus, on both occasions, November 28, 1979 and January 3, 1980, the only proof against the Petitioner was some drugs allegedly found at the place she lived at, 217 Northwestern Parkway.

This court has held that due process requires that no person shall be convicted of a criminal offense except upon sufficient proof. *In re Winship,* 397 U. S. 358 (1970). More recently, this court has held that the proof must convince a rational trier of fact that a defendant is guilty beyond a reasonable doubt. *Jackson* v. *Virginia,* 443 U. S. 307 (1979). The quality of the proof in the present case does not meet those tests. Therefore, Petitioner's due process rights have been violated and the Writ ought to be granted.

III. Prior to the testimony of the first witness in Petitioner's trial, a hearing was held by the court regarding her Motion to Suppress. The basis of said motion was that the affidavits involved failed to establish probable cause for the issuance of the search warrant.

First of all, the affidavit for the search of November 28, 1979 (Appendix D), states ". . . that during the last thirty-six hours the informant was at the residence of a black female known to the informant as HELEN." At no place on that affidavit is an address specified. It is well settled that the informant must show himself to be reliable by the information he gives. *Spinelli* v. *United States,* 393 U. S. 410 (1969); *Aguilar* v. *Texas,* 378 U. S. 108 (1964). In this case, when the

informant apparently was unable to even give the Detective an address where he allegedly saw a criminal act, his reliability must obviously be brought into question. The information that a criminal act was committed by a woman named HELEN at her residence is clearly insufficient to support the issuance of a search warrant. Further, the Detective, in an effort to salvage his warrant, states that during the past three months he had received other information concerning drugs being sold by a black female named HELEN at 217 Northwestern Parkway. There is no proof whatsoever, however, that the person referred to at the top part of the affidavit is the same HELEN living at 217 Northwestern Parkway. Obviously, there is a serious deficiency in the affidavit and therefore Ms. Frierson's Motion to Suppress Evidence seized pursuant to the search based on the search warrant executed on November 28, 1979 at 217 Northwestern Parkway ought to have been sustained and said evidence suppressed.

There was clearly insufficient probable cause for the issuance of the search warrant and Petitioner's Fourth Amendment rights were violated. Thus, Petitioner prays this Writ be granted.

CONCLUSION

For the reasons set forth above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix

APPENDIX A

OPINION RENDERED: AUGUST 14, 1981; 10:00 A.M.
NOT TO BE PUBLISHED
AS MODIFIED: AUGUST 21, 1981; 2:00 P.M.

COURT OF APPEALS OF KENTUCKY

No. 81-CA-318-MR

HELEN BAILEY FRIERSON - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Jefferson Circuit Court
Honorable Curtis Witten, Judge
Action No. 80-CR-0265

AFFIRMING

BEFORE: GANT, GUDGEL and VANCE, Judges.

VANCE, JUDGE. On two separate occasions police officers with a warrant searched the household of appellant. On each occasion they found contraband. She was convicted of trafficking in a Schedule II nonnarcotic known as preludin on each of the occasions and her penalty was enhanced because of previous violations.

The appellant was not entitled to require disclosure of the name of a confidential informant. *Burks* v. *Commonwealth*, Ky., 471 S. W. 2d 298 (1971), is not applicable because in *Burks* the undisclosed informant actively participated in the crime and was therefore a witness to it. The crime here was trafficking in a controlled substance on two different occasions and the undisclosd informant did not

participate on either occasion. The informant furnished information for a search warrant. *See* KRS 218A.260.

The court did not err in failing to suppress the fruits of the search. Contrary to the statement of appellant in her brief, the affidavit for the search warrant did disclose the address where the informant had allegedly seen the unlawful sales and the property to be seized was described as preludin and any other substance in violation of KRS 218A.000. We think this a sufficient designation of contraband and the affidavit was sufficient to support the warrant.

The trial court did not err in refusing to conduct a bifurcated trial as to the enhancement penalty. It is true the legislation has seen fit to provide for a bifurcated trial in persistent felony offender cases, but it has not seen fit to extend the bifurcated trial to these types of cases. We acknowledge that the reasons generally cited for a bifurcated trial would equally apply here; yet, the matter is one for the General Assembly. There is no constitutional requirement for a bifurcated trial and, indeed, in the habitual criminal cases the constitutionality of an enhanced penalty without a bifurcated trial was not deemed to be a constitutional violation.

The evidence was sufficient to sustain the verdict. The controlled substances were found in the appellant's premises on two occasions in a quantity that would reasonably indicate possession for the purpose of sale and on the first occasion an undercover officer who attempted to make a purchase before the search was carried out, was told by appellant that she did not have any preludin for sale right then; that "she just couldn't let these go" and in substance if he didn't find any elsewhere to come back tomorrow.

We find no merit or prejudice in the claim that inadmissible evidence was admitted at the trial.

The judgment is affirmed.

ALL CONCUR.

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APPENDIX B

SUPREME COURT OF KENTUCKY

81-SC-629-D
(81-CA-318-MR)

HELEN BAILEY FRIERSON - - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

Jefferson Circuit Court
#80-CR-0265

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion of Helen Bailey Frierson for a review of the decision of the Court of Appeals is denied.

ENTERED November 17, 1981.

/s/ John S. Palmore
Chief Justice

APPENDIX C

TRANSCRIPT OF TESTIMONY

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[Reporter's Note: At this point the jury, having been admonished by the court, is excused for the short recess whereupon, the following proceedings were conducted in open court outside the hearing of the jury.]

Court: Who is going to be the first witness?

Mr. McCall: Judge, at this time I would like to call Detective Gary Epperson to the stand, please.

Court: All right.

Mr. Wilson: Judge, at this time I would like to know what the grounds are for the motion to suppress.

Mr. McCall: Well, the grounds are—they are numerous grounds, but I have to put some proof on first. But, basically, it is that the officer didn't have probable cause in both instances to obtain

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the issuance of the search warrants.

Court: The affidavit—did you say that he received this on a reliable informant?

Mr. McCall: Yeah, that kind of stuff.

Court: Well, we can't go into your source of informants.

Mr. McCall: Well, I need to put it on the record, you know.

Court: All right. Sure. Go ahead.

Mr. McCall: Before we start, I've got the backs here, and I want to—which one are the backs, because I have to Xerox them. I want to file them in the record. It that the right back?

[Reporter's Note: At this point, off-the-record discussions were held.]

Court: Come on, Gentlemen, time is wasting.

DETECTIVE GARY EPPERSON, having been called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

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Examination

By Mr. McCall:

Q. 1. Detective Epperson, did you obtain a search warrant from Detective—from Judge Ray on November 28th to search the dwelling located at 217 Northwestern Parkway?

A. Yes, sir, I did.

Q. 2. And I want to show you a copy of an affidavit in support of that motion and ask you if that is the affidavit that you swore to before Judge Ray.

A. [Inaudible]

Q. 3. All right. And the person named on the front of that affidavit is a person by the name of Helen, is that right?

A. That's right.

Q. 4. And that name is not mentioned on that indictment—I mean on that affidavit in support of that search warrant, is it?

A. No, sir, not on the front.

Q. 5. Okay, Not on the front. Okay. And the same Helen Frierson is not mentioned on the rear of that affidavit either, is it?

A. No, sir, not Frierson.

Q. 6. Okay. What?

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A. Not—No, sir, not Frierson.

Q. 7. Okay. Now, after you received that information, the independent investigation that you conducted

was that you put on the affiidavit that during the three months you have received other information from other informants concerning a large quantity of drugs being sold by a black female named Helen at 217 Northwestern Parkway. A check of city and county directories shows that a Helen Bailey living at 217 Northwestern Parkway; is that true?

A. That's true.

Q. 8. Now, were these other informants that you received information from, were they confidential informants? You didn't put that in the affidavit.

A. Yes, sir, they were.

Q. 9. Oh, they were?

A. Yes.

Q.10. And how many informants were there that were confidential informants then?

A. I think one other informant.

Q. 11. One other one.

A. [Inaudible]

Q. 12. Well, you said "other informants," on the back of the affidavit, plural. Can you remember how many it was?

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A. One other informant.

Q. 13. All right. But that was a confidential informant?

A. Yes, sir, it was.

Q. 14. Okay. Now, on the body of the affidavit there it indicates that during the last 36 hours the informant was at the residence of a black female known to the informant as Helen; is that right?

A. That's true.

Q. 15. And the informant told you that be observed Helen with a large quantity of Preludins which she was offering for sale, is that right?

A. True.

Q. 16. So, actually he was a witness to her being in possession of those Preludins, wasn't he, from what he told you?

A. Yes, sir, he was.

Q. 17. All right. And you stated to the court that you knew he was a truthful and reliable informant, because he had given you previous information, didn't you?

A. Yes, sir, I did.

Q. 18. And do you remember in the lower court when we tried this case that you were questioned about this matter?

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A. I don't recall it. I recall being downstairs and I recall having a hearing, but I don't recall.

Q. 19. Okay. Do you recall me asking you who that informant was, and you—the judge—the judge told you you didn't have to tell me who it was?

A. Yes.

Q. 20. All right. I want to ask you, again, at this time, for the record, do you know who the confidential informant was you talked to about this on this occasion?

A. Yes.

Q. 21. All right. And the informant told you he saw a woman named Helen with Preludins for sale in this house, didn't he?

A. That's true.

Mr. McCall: All right, Judge. Under the case of *Powers versus the Commonwealth* and another case, which I'll have to think of shortly, says that if he was an actual witness to the possession crime, it is our contention that we are entitled to know who he is and that the officer be forced to tell us who he is.

Court: Mr. Wilson, let me

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hear you on it.

Mr. Wilson: All right, Judge. Miss Frierson is charged with trafficking on the 28th day of November, 1979. From the affidavit, the information was there prior to this time and would not have been a witness to the transactions that the police came down—when the police came down there and found the drugs; so, he is not the witness to any of the crimes, and—

Court: [Interrupting] Well, Mr. McCall, it's my recollection of the law, and I'll take is under advisement, that the confidential informant would have to be there on the scene when it happened, because, otherwise, how could you ever have a confidential informant? She had to know—

Mr. McCall: [Interrupting] The officer just testified he was there on the scene and saw the woman named Helen.

Court: The day of the arrest?

Mr. McCall: Sir?

Court: The day of the arrest? The day he arrested her?

Mr. McCall: No, the day he gave them the information. The crime had been committed.

Court: Well, I'll take it

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under advice, but I'll overrule it at this time because I don't know how you could ever have a confidential informant that wouldn't be a natural witness.

Mr. McCall: Okay, Judge, so you are not going—

Court: I'll overrule it, and I'll take it under advisement later on.

Mr. McCall: Okay. Oh, oh, let's see.

Q. 22. Now. Officer, based upon what you have in the body of the affidavit there, the informant did not give you the address that you gave to the judge at that point. He says he was at the house—house residence of a black fe-

male known to him as Helen. You didn't put here at this point what the address was, did you?

A. Sir, he had already told me the address. If you will check on the front of the affidavit, you will find I have 217 Northwestern Parkway. That's the address he told me.

Q. 23. Why didn't you put that in the body of the affidavit is what I'm asking you. I know it's on the front of here, and it's in the search warrant. Why didn't you put it—the address that

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this informant was talking to you about at that time here so that the judge could read it?

A. It says her residence and I have her residence as being 217 Northwestern Parkway on the affidavit.

Q. 24. How do you know that the Helen he was talking about is the same one that you put the residence of on the front of the affidavit?

A. Telling you the same person in the information.

Mr. McCall: Judge, I want to show it to the court. They don't have the address—

Court: [Interrupting] Well, those are highly technical, and I told you, Tim, I'll take them under advisement when we come to it.

Mr. McCall: All right. All right.

Court: At first blush it looks to me like it's all right because he's got it tied down sufficiently. Go ahead.

Q. 25. Nowhere on the front of the affidavit or on the back of the affidavit is there anything that says the informant told you the location where the Helen was was 217 Northwestern Parkway. Does it say that?

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A. The informant told me she was at 217 Northwestern Parkway, which is on the affidavit and on the back

of it, and in support of the affidavit I advised them it was her address.

Q. 26. You didn't put on the affidavit there that the informant told you the address though, did you?

A. The affidavit says 217 Northwestern Parkway.

Q. 27. Yeah, the front of the affdavit. That doesn't say anything about what the informant said. That says that you were sworn and you had the probable grounds to believe at that location, but where the affidavit—where the informant on the back gave you information there, you don't say that the location is 217 Northwestern Parkway. You don't even give a location, do you?

A. It just states her residence.

Q. 28. Her residence, yes. Okay. Now,—Okay, Judge, that's the affidavit as to—that's the motion to suppress as to Count One of the indictment dealing on—excuse me, Count One of the indictment dealing with the search on November 28, 1979. In addition to that, for my argument on that motion, is that what they are looking for is Preludins and any

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other controlled substances in violation of this K.R.S. 218(A) 1000, and my—the other part I want to argue to the Court is that Preludins are properly prescription drugs, and they can be in legal containers, and they can be legal; and I don't think the search—the way they have set forth in the affidavit is sufficient for the judge to issue a warrant based upon probable cause.

The Court: Well, Mr. McCall, I find your argument to be highly technical, and I'll overrule you.

Mr. McCall: Okay. Now, Judge, may I submit to the Court and to put in the record the affidavit of November 28th and the search warrant of November—

Court: [Interrupting] Why don't you put Defense Exhibit 1—No. 1 if we might.

Mr. McCall: Okay.

Court: Will you now take Defense Exhibit No. 1 and—

Mr. McCall: [Interrupting] Judge, off the record just a minute. I've got a court reporter here, and you are welcome to keep her here, but I want a reporter. Do you have any objection to that? Because I don't like these machines.

Court: Well, I don't like

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double reporters.

Mr. Wilson: I don't have any objection Judge. Debbie can go back to her work if Tim wants to.

Mr. McCall: Yeah.

Court: All right. He will take over from here.

Now, let's let her go on and take this—take the rest of these. Do you have any more motions to suppress?

Mr. McCall: Yeah.

Court: Well, all right. Let's go. Let her take that part so it will all be in one.

Mr. McCall: Okay.

Q. 29. Now, on that search, just one or two other questions, Officer. Is it your testimony that you found the drugs there on that occasion or some other officer?

Mr. Wilson: I object. That has nothing to do with the search warrant. Whether he found drugs or not.

Court: That doesn't have anything to do with the search warrant.

Mr. McCall: Judge, where the

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drugs were found and why he didn't mark it on the inventory here is important.

Court: I agree with Mr. Wilson. It might be important, but as far as this search warrant is concerned, I don't see where it has any—overruled.

Mr. McCall: All right. Well, I'd like to have an exception to that.

Court: All right.

Q. 30. Officer, did you prepare an inventory on the back of the search warrant and furnish it to the Court after the execution of the search warrant?

A. Yes, sir, I did.

Q. 31. And do you have that with you today, because it's not on my search warrant.

A. I sure do.

Mr. McCall: All right, Judge, we need a copy of that official search warrant to be made part of the record here.

Court: Very well, we will make that Defendant Exhibit 2, and we will make you a copy of it.

Mr. McCall: All right.

Q. 32. And would you agree that—

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that on the back of that is $1385.00 in cash you put, and it looks like the numbers have been changed there. It looks like one has got a seventeen in it. That cash wasn't recovered by you; that cash was recovered by Hise, wasn't it?

A. Yes.

Q. 33. And it was Preludins and you didn't put a number there.

A. [Inaudible]

Q. 34. Do you know how many Preludins it was?

A. Yes, I do.

Q. 35. How many?

A. Ten.

Q. 36. Ten. A marijuana cigarette and a revolver.

A. Correct.

Mr. McCall: Okay, Judge, just for the record I can get a Xerox of that to go into the file.

Court: Yes, and that will be Defendant Exhibit No. 2, Mr. McCall.

Mr. McCall: All right.

Court: We will substitute that during recess.

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Mr. McCall: Okay.

Court: Well, do you have anymore motions?

Mr. McCall: Yeah, I've got other motions here, Judge. As to the search warrant of January 3rd, 1979, Count Two of the indictment, at this time I would like to have a hearing on that motion.

Court: All right. Let me do this. We are going to run—I'm going to tell the jury to go to lunch and come back at one, because we are going to end up here at—we are going to run the jury right on up. You all told me this would take a few minutes, and we've already gone twenty now—now, on one motion.

Mr. Wilson: Judge, there's only one problem. I don't have any objection to doing that except for the fact that I like to get this—you know, keep this trial moving.

Court: I do too, but, evidently there's just a lot of questions, paper shuffling and all that kind of stuff, you know. I was led to believe that—

Mr. Wilson: Let me give you my reasons. Mr. McCall and I have another trial together tomorrow in Judge Higgins' that's been continued like

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four times, and Judge Higgins told us he wanted to try it on that date.

Mr. McCall: Well, he'll just have to wait, that's all. We can't be at two places at one time.

Court: Well, I can't be responsible for that. What I'm saying here, I can't tell the jury they have a 15-minute break, and then we run into a 35, and just keep telling them to—tell them to come in and hold it right there, and I'll tell them to come back at one o'clock.

[Reporter's Note: At this point off-the-record discussions were held; whereupon the following proceedings were continued.]

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Mr. McCall: Judge, on the search warrant of January 3rd, 1980, I want to question the officer.

Q. 37. Are you the Officer Gary T. Epperson who signed the affidavit on that case, the same as you did on November the 28th?

A. Yes, sir, I am.

Q. 38. And, Officer Epperson, I have a copy, which I think we can clear up, dated January 3, 1979 signed by Judge McDonald. That was actually January 3rd, 1980, is that correct?

A. That's right. I have a copy where he has January 3rd, 1980.

Q. 39. Okay. We will Xerox your copy to put in the record.

A. That's not a Xerox of his signature. As you will see, it's a Xerox.

Q. 40. Okay. We will use yours. Just in case this gets into the record, I don't want it to be confusing.

In any event, on the back of that search warrant, do you have, likewise, an inventory that we can mark this search warrant and this affidavit as Exhibits 3 and 4?

A. Yes, sir, I do.

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Q. 41. And would you tell the Court what the inventory shows on the back of that search warrant, please? Just read it.

A. "One sock containing three foils, 15 each Preludins. One foil containing 5 Preludins. One bag of marijuana." And then down the other is a plastic bag containing marijuana that came out of Charlie Roger's room,

and a plastic bag containing marijuana that came out of Yelonda Miles' room.

Q. 42. Okay. Now, on that search warrant you received information on the affidavit from a confidential informant; is that true?

A. Yes, sir, I did.

Q. 43. Was that the same confidential informant that gave you the information in the last case?

Mr. Wilson: I object.

Court: Overruled.

Q. 44. Is that the same one or different one?

A. Same one.

Q. 45. Now, on that particular case—this was the second one—you have in the body of the affidavit that it was at Helen Frierson's residence, and while at her residence at 217 Northwestern Parkway he observed a large quantity of Preludins which were

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wrapped in foil and were being offered for sale by Helen Frierson.

A. That's correct.

Q. 46. Now, just for my own edification, do you mean by your affidavit there that Helen Frierson was there present offering them for sale, or was that a conclusion he gave you when he saw them packaged, is what I'm trying to find out.

A. Exactly what it says in the affidavit.

Q. 47. What?

A. It says that he was at the residence of 217 Northwestern Parkway. The informant observed a large quantity of Preludins wrapped in a foil package and were being offered for sale by Helen Frierson.

Q. 48. Okay. What does that mean is what I'm trying to say.

A. Exactly what it says.

Q. 49. What?

A. Preludins were being offered for sale by Helen Frierson.

Q. 50. She was there offering them for sale?

A. Yes.

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Q. 51. Okay. They weren't just laying there and he knew it was Helen Frierson's?

A. Yes.

Q. 52. Okay. And on this occasion, likewise, then he saw the drugs packaged, and he saw Helen Frierson there. And for the same reasons, the Powers case and the case—oh, what's the name of the—Judge Shobe was the lawyer for.

Mr. Wilson: I don't remember his name.

Mr. McCall: Do you know the case I'm talking about though?

Court: You are talking about witness cases, aren't you?

Mr. McCall: Yeah, the witness case. I would move the Court, then for a denial of confrontation of witnesses. I move to make them produce the confidential informant in this case, Judge.

Court: Well, Mr. McCall, it's my understanding that—of the law, and I may be wrong, that if you have a witness there at the time when the arrest is made and seeing all this, you have to reveal them, otherwise you do not. And, however, I will still take it under advisement if you think I'm wrong. So, it is overruled.

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Mr. McCall: All right.

Now, let's see.

Q. 53. Now, Officer, based upon the information that the informant gave you on January 3, in that case you really didn't do anything other than type up the warrant. You said that you were familiar with Helen Frierson and

her involvement with dealing and that she had a previous conviction and arrested, and you put that information down, but you didn't do anything acting on the information that the agent gave you, did you?

A. No, sir.

Mr. McCall: And, Judge, for that reason, on this affidavit under the test of Augilar and Spinnelli, where a confidential informant is used, the officer must do something in reliance on that information—go out and investigate to see that it is truthful, and he just admitted that he didn't do anything except say that he knows Helen Frierson and she had been convicted before.

Court: Mr. Wilson, let me hear you on that.

Mr. Wilson: Judge, the cases—the way I interpret the case is if when you have a confidential informant and it's been proven

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in the past that—that is enough in the affidavit.

Court: What about the case Tim just—that you are obligated—

Mr. Wilson: [Interrupting] I don't think it's—it stands for that proposition.

Court: Well,—

Mr. McCall: [Interrupting] Augilar and Spinnelli is a two-pronged case. If you have a confidential informant to bolster his reliability you must do something relying upon it and prove that some of the things he told you is the truth, like he did in the first affidavit when he went and saw—

Court: [Interrupting] Bring me the case back before we adjourn and let me read it for myself.

Mr. McCall: All right.

Q. 54. Now, Officer, on the affidavit of January 3, 1980, as compared to the one of November 28, 1979, you indicated that both of the informants were the same person, but

would you admit to me that the information that you gave regarding the arrest and convictions as to those dates is different information?

A. That's correct, it is.

Q. 55. And did you do that because

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you wanted to disguise who the informant or you just thought you had different information about him?

A. I did that in order to try to make it look like it was not the same informant.

Q. 56. All right, sir. In other words, you were trying to protect and disguise who the informant was; isn't that right?

A. Yes, sir.

Q. 57. Okay. But now on the first one, November 28th, 1979, you indicated on this situation that—that information had led to the arrest and conviction of these six individuals.

A. That's correct.

Q. 58. Was that true at the time you told that to the judge?

A. Yes, sir, it was.

Q. 59. And on the other one you said that led to the arrest and conviction of at least four individuals and the arrest of at least three other individuals; is that right?

A. That's correct.

Q. 60. And that is true, too, wasn't it?

A. Yes, sir, it was.

Q. 61. Okay. Did you meet with

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this confidential informant on personal basis on both of these occasions or was it by phone conversation?

A. Personal.

Q. 62. Personal both times?

A. Yes.

Q. 63. And was this confidential informant a paid confidential informant of the Jefferson County Police Department?

A. Yes, sir, he was.

Q. 64. And was he in your program where he is—his code name is mentioned in a book and shows the amount of money he received for getting this information?

A. I don't believe so.

Q. 65. All right. You admit—how much was he paid for the information on January 3rd, 1980?

A. I don't know.

Q. 66. Well, you have to turn a report in, they don't just give you an unlimited supply.

Court: I think—

Mr. Wilson: [Interrupting] Objection.

Court: Do they have a

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different accounting system? In other words, do you turn it in and does somebody make the payment, is that what it is?

Witness: No, sir, I pay them and turn it in to our Sergeant.

Mr. McCall: Right.

Court: Did you turn anything in on this man?

Witness: Yes, but I have no idea how much money it would have been.

Mr. McCall: I'm going to ask the Court, because it may very well be on the second count that the informant planted these drugs over there and I want to know how much he was paid for the information. I don't know how much he was paid the first time or the second time.

Mr. Wilson: Judge, I think that's irrelevant.

Court: No, it isn't. It can go to bias, and I don't think so.

Mr. Wilson: Okay. Let me state for the record then my objection to this. It has nothing to do—Judge, we can't go behind the search warrant—the affidavit. Probable cause is determined by what's on this affidavit. We can't go

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behind that, and there's several cases dating that.

Mr. McCall: I agree to that.

Court: Yeah.

Mr. Wilson: As to whether the informant was paid is irrelevant as to whether there is probable cause in this search warrant. If there is probable cause on this search warrant, then the search warrant is good, and that's the end of that matter.

Court: Mr. McCall, how do you answer that? Do you have a case?

Mr. McCall: Judge, the Court hit the nail on the head. I just tried one with Judge McDonald six months ago, and we are entitled to know if the informant had been paid; there isn't any question about that in my mind, to show motive and bias in this situation. We are entitled to know how much he received on both of these occasions. The officer has admitted he was a paid informant and it's just a matter of them getting records as to how much he was paid.

Mr. Wilson: If he were a witness to this crime as charged—

Court: [Interrupting] What

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are you saying, Mr. Wilson, you know, that this informant made a good deal of money for this thing, and then he goes right back out—gets a couple months more and he's got a good thing going, I'd like to know that.

Mr. Wilson: Well, Judge,—

Court: [Interrupting] Because it would go to the integrity of the officer—not the officer but the integrity of the informant.

Mr. Wilson: What I'm saying is the trustworthiness of the informant is to be decided as of the time the affidavit was made.

Mr. McCall: I'm sure he was paid by them.

Mr. Wilson: If there was trustworthiness in that affidavit showing there was trustworthiness, then that is enough. You don't go behind the affidavit to find out everything about the relationship between the police and the informant.

Court: I'm not entirely sure about that, but I'll hear you. How much longer are you going to go now, Mr. McCall?

Mr. McCall: I'm just about finished, Judge.

Court: Well, can you get me

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any cases or anything so I can determine if Mr. Wilson is wrong? He appears to be right. You have got to look at an affidavit and a search warrant and look on the face of it, but I don't—it just doesn't look right if a person gets a thousand dollars in December, and then turns around and gets another thousand in November.

Mr. Wilson: Judge, all of these informants, I would think, are paid something.

Court: Yes, paid something, but I would like to know, you know, what. But go ahead and come back up at quarter of one, and I will see if you've got something on that.

Mr. McCall: Let's see, I think we are just about finished, Judge. Let me look at it one more second.

Q. 67. But you will admit that based upon the evidence that the informant gave you on January 3rd, you didn't do anything else other than type up the affidavit and present it to the judge?

A. I knew—yes, sir, I typed up the affidavit.

Q. 68. You had the information in your head, and you knew—and that's how you verified he was telling you because you had prior knowledge, is

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that true?

A. Correct.

Mr. McCall: Okay. Okay. Now, that's all I have at this time. I just want the record to be clear that I would like to Xerox a copy of your affidavit—both sides of it—and your search warrant—both sides of it—to mark as Exhibit No. 3 and Exhibit No. 4. Is there any problem with that?

Court: Mr. McCall, I'll overrule your motions pending—later on, I may want to change my mind, and that's the best I can do.

Mr. Wilson: Judge, I would like to ask him a couple of questions.

Court: Very well.

Cross-Examination by Mr. Wilson

Q. 69. Officer—Detective Epperson, on the affidavit on the 3rd day of January, 1980, the second portion, it says: "Acting on the information received, affiant conducted the following independent investigation." Was that investigation done prior to—

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and you mentioned here: "Officers made familiar with Helen Frierson and her involvement in dealing in Preludins. She has a previous conviction for trafficking in a controlled substance and was arrested on 11-28-79 for trafficking in a controlled substance."

Was that conducted—was this investigation conducted prior to the information from the informant?

A. Yes, sir.

Q. 70. So I gather that you already had information as to her involvement in the drug community?

A. Yes, sir.

Q. 71. Based upon your previous arrest of November 28th, is that right?

A. Correct.

Q. 72. And based upon a previous conviction?

A. Correct.

Q. 73. And on November 28th you found some— or someone— one of the other officers found some Preludins at her house at that time,—

A. [Interrupting] Correct.

Q. 74. [Continuing]—is that correct?

A. Correct.

Mr. McCall: Judge, for the record, then,—

Redirect Examination by Mr. McCall

Q. 75. You know, you have got a printed form that you all are using here right?

A. Right.

Q. 76. And all of them say "Acting on information received, affiant conducted the following independent investigation." Scott just asked you if you already done that before. And my question to you is, acting on the information received, you conducted the following independent investigation—you didn't conduct an independent investigation, you didn't do a darn thing independently, did you?

A. I've been doing everything you could think of for the last six months independently.

Q. 77. All right. But after he gave you the information you gave to Judge McDonald, you didn't do one thing other than type this up.

Court: Judge Ray, isn't it?

Mr. McCall: Judge McDonald

on this one, Judge.

Court: Okay.

A. No, sir, I did not.

Mr. McCall: Okay. That's all I have.

Finally, Judge, let me say this, and I'll bring it over to you at quarter till one. As to both of these affidavits, they are both defective in the way it's to be taken, and I'll bring the law over on it—the way the acknowledgement is taken in both of these affidavits is defective, but I'll bring it over to you and show it—the law I'm talking about on that.

Court: I'll hear you on the law on it between quarter till one and one.

Mr. McCall: Okay.

[Reporter's Note: At this time lunch recess was held; whereupon the following proceedings were conducted thereafter in open court in the presence of the jury.]

* * * * * * *

COMMONWEALTH OF KENTUCKY
District COURT

COMMONWEALTH OF KENTUCKY
COUNTY OF JEFFERSON COUNTY

AFFIDAVIT IN SUPPORT of and
PETITION FOR SEARCH WARRANT

Comes the affiant, Det. Gary Epperson
a peace officer of JEFFERSON COUNTY POLICE DEPARTMENT
who personally appeared before the undersigned and being first duly sworn now on oath deposes, affirms and says that he has and there is reasonable and probable grounds to believe and affiant does believe that there is now on the premises known and numbered as 217 North Western Parkway
and more particularly described as follows: a two story brick building with white trim. The numbers 217 appear on the front of the dwelling. Dwelling sets on east side on North Western Parkway facing west.

and/or in (a) vehicle(s) described as

and/or on the person(s) of Helen, b/f 40 to 50 years

the following described personal property to wit: Preludins, and any other substance in violation of KRS 218A.000 of the Kentucky Controlled Substance Act of 1972.

Affiant states that there is probable and reasonable cause to believe and affiant does believe that said property constitutes (check appropriate box or boxes)

(x) stolen or embezzled property;

(x) property or things used as the means of committing a crime;

(x) property or things in the possession of a person who has intention to use same as means of committing a crime or in the possession of another to whom any person may have delivered it for purpose of concealing it or preventing its being discovered;

(x) property or things which consist of evidence which tends to show that a crime has been committed or that a particular person has committed a crime.

Affiant has been an officer in the above agency for a period of 6 years and the information and observations contained herein were received and made in his capacity as an officer thereof.

On the 28 day of November ,1979, at approximately 11:30 a.m./~~P.M.~~, affiant received information from a reliable confidential police informant whom affiant knows to be a truthful and reliable individual who fears for his life and personal safety and wishes to remain anonymous, and should his identity be revealed would destroy his effectiveness as a police informant; that during the last 36 hours the informant was at the residence of a black female known to the informant as Helen. And while at that residence the informant observed Helen with a large quanitity of preludins which she was offering for sale. Affiant states that he knows the informant to be a truthful and reliable individual, because during the last year the informant has furnished information that has lead to the arrest and conviction of at least 6 individuals all of which dealt with the sale and possession of controlled substance. The above took place in Jefferson County.

Acting on the information received, affiant conducted the following independent investigation: During the past 3 months I have received other information from other informants concerning a large quanitity of drugs being sold by a black female named Helen at 217 North Western Parkway. A check of City and County directory shows that a Helen Bailey living at 217 North Western Parkway.

Affiant has reasonable and probable cause to believe that grounds exist for the issuance of a search warrant, based on the aforementioned facts, information and circumstances and prays that a search warrant be issued, that the property be seized, or any part thereof, and brought before any court and/or retained subject to order of said court.

Doug T. Efferson
Signature of Affiant

Subscribed and sworn to before me on this 28 day of Nov ,1979 at 4:30 a.m./p.m.

Judge Jefferson Circuit Court

DEFENDANT'S EXHIBIT

95-46

THE COMMONWEALTH OF KENTUCKY

IN THE District COURT

OF JEFFERSON COUNTY KENTUCKY

SEARCH WARRANT

To any policeman, sheriff, constable or other peace officer of the Commonwealth of Kentucky:

Proof by affidavit having this day been made before me by Det. Gary Epperson, a peace officer of Jefferson County Police Department that there is probable and reasonable cause for the issuance of this search warrant as set forth in the affidavit attached hereto and made a part hereof as if fully set out herein; you are commanded to make immediate search of the premises known and numbered as

217 North Western Parkway in Jefferson County / Kentucky

and more particularly described as follows: A two story brick building with white trim. The numbers 217 appear on the front of the dwelling. Dwelling sets on east side of North Western Parkway facing-west.

DEFENDANT'S EXHIBIT #2

and/or (a) vehicle(s) described as

and/or the person(s) of Helen, b/f 40 to 50 years old

for the following personal property, to wit: Preludins, and any other substance in violation of KRS 218A.000 of the Kentucky Controlled Substance Act of 1972.

and if you find same or any part thereof, to bring it forthwith before me or any other court in which the offense in respect to which the property or things taken is triable, or retain such property in your custody subject to the order of such court.

Witness my hand the 28 day of May, 1995.

Judge, [illegible] District Court

THE COMMONWEALTH OF KENTUCKY
IN THE Jefferson Circuit COURT
OF JEFFERSON COUNTY KENTUCKY

SEARCH WARRANT

To any policeman, sheriff, constable or other peace officer of the Commonwealth of Kentucky:

Proof by affidavit having this day been made before me by Det. Gary Epperson, a peace officer of Jefferson County Police Department that there is probable and reasonable cause for the issuance of this search warrant as set forth in the affidavit attached hereto and made a part hereof as if fully set out herein; you are commanded to make immediate search of the premises known and numbered as 217 North Western Parkway Louisville, Ky. in Jefferson County / Kentucky and more particularly described as follows: A two story brick dwelling with white trim. The numbers 217 appear on the front of the dwelling. The front door and back door both have a black wrought iron gate in front of them. The building sits on the east side of North Western Parkway facing west.

DEFENDANT'S EXHIBIT #3

and/or (a) vehicle(s) described as 1967 Olds, DVB 519

and/or the person(s) of Helen Prierson, BF, 55.

for the following personal property, to wit: Preludins. And any other substances in violation of KRS 218A.000 of the Kentucky Controlled Substances Act of 1972.

and if you find same or any part thereof, to bring it forthwith before me or any other court in which the offense in respect to which the property or things taken is triable, or retain such property in your custody subject to the order of such court.

Witness my hand the 3 day of January, 1980.

Richard W. Edwards

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THE COMMONWEALTH OF KENTUCKY
Jefferson Circuit COURT

COMMONWEALTH OF KENTUCKY
COUNTY OF JEFFERSON COUNTY

AFFIDAVIT IN SUPPORT of and
PETITION FOR SEARCH WARRANT

Comes the affiant, Det. Gary Epperson
a peace officer of JEFFERSON COUNTY POLICE DEPARTMENT
who personally appeared before the undersigned and being first duly sworn now on oath deposes, affirms and says that he has and there is reasonable and probable grounds to believe and affiant does believe that there is now on the premises known and numbered as 217 North Western Parkway, Louisville, KY in Jefferson County / Kentucky and more particularly described as follows: A two story brick dwelling with white trim. The numbers 217 appear on the front of the dwelling. The front and back door both have a black wrought iron gate in front of them. The building sits on the east side of North western Parkway facing west.

DEFENDANT'S EXHIBIT #4

and/or in (a) vehicle(s) described as 1967 Olds, DVR 319

and/or on the person(s) of Helen Frierson, BF, 55.

the following described personal property, to wit: Prelu*ins. And any other substances in violation of KRS 218A.000 of the Kentucky Controlled Substances Act.

Affiant states that there is probable and reasonable cause to believe and affiant does believe that said property constitutes (check appropriate box or boxes)

(X) stolen or embezzled property;

(X) property or things used as the means of committing a crime;

(X) property or things in the possession of a person who has intention to use same as means of committing a crime or in the possession of another to whom any person may have delivered it for purpose of concealing it or preventing its being discovered;

(X) property or things which consist of evidence which tends to show that a crime has been committed or that a particular

Affiant has been an officer in the above agency for a period of 7 years and the information and observations contained herein were received and made in his capacity as an officer thereof.

On the 3 day of Jan ,19 80, at approximately 1000 a.m./p.m. affiant received information from/observed a reliable, confidential police informant whom affiant knows to be a truthful and reliable individual who fears for his life and personal safety and wishes to remain anonymous and should his identity be revealed would destroy his effectiveness as a police informant, that during the past forty eight hours the informant was at the residence of Helen Frierson and while at her residence at 217 North Western Parkway the informant observed a large quantity of Preludins which were wrapped in a foil package and were being offered for sale by Helen Frierson. The informant is familiar with the drug known as preludine and the way they are packaged when for sale. Affiant states that he knows the informant to be a truthful and reliable individual because during the past eighteen months the informant has furnished information which has led to the arrest and conviction of at least four individuals; and the arrest of at least three other individuals which are still pending in court all of which involved the sale and possession of controlled substances. The above took place in Jefferson County.

Acting on the information received, affiant conducted the following independent investigation: Officer is familiar with Helen Frierson and her involvement in dealing in preludins. She has a previous conviction for PWCS and was arrested on 11-28-79 for PWCS.

Affiant has reasonable and probable cause to believe that grounds exist for the issuance of a search warrant, based on the aforementioned facts, information and circumstances and prays that a search warrant be issued, that the property be seized, or any part thereof, and brought before any court and/or retained subject to order of said court.

Gary T. Emerson
Signature of Affiant

Subscribed and sworn to before me on this 3 day of January ,19 80 at 11 55 (a.m./p.m.)

Clifford O. McDonald
Judge, Jefferson Circuit Court

Opposition

Office - Supreme Court, U.S.
FILED
FEB 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1367

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

HELEN BAILEY FRIERSON - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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QUESTIONS OF LAW PRESENTED FOR REVIEW

1. Should the penalty enhancement portion of petitioner's trial have been conducted separately from the trial in chief;

2. Was petitioner's conviction based on insufficient evidence; and

3. Should the evidence used against petitioner have been suppressed.

LIST OF PARTIES

1. Petitioner is Helen Bailey Frierson. Counsel for petitioner is Hon. John Tim McCall.

2. Respondent is the Commonwealth of Kentucky. Counsel for respondent are Hon. K. Gail Leeco and Hon. John H. Gray.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1367

HELEN BAILEY FRIERSON - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

May it please the Court:

CITATIONS TO OPINIONS AND JUDGMENTS DELIVERED IN COURTS BELOW

Helen Bailey Frierson v. Commonwealth of Kentucky, Court of Appeals of Kentucky, No. 81-CA-318-MR. Opinion rendered August 14, 1981. Not To Be Published.

Helen Bailey Frierson v. Commonwealth of Kentucky, Supreme Court of Kentucky, No. 81-SC-629-D. Order denying Motion for Discretionary Review. Entered November 17, 1981.

GROUNDS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND OTHERS

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

The Fourth Amendment to the Constitution of the United States as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Kentucky Revised Statute 218A.990(2)(a) provides:

> Any person who knowingly and unlawfully traffics in a controlled substance classified in Schedules I or II other than a narcotic drug, except marijuana, lysergic acid diethylamide or phencyclidine, or in any controlled substance classified in Schedule III shall, for the first offense, be confined in the penitentiary for not less than one (1) year nor more than five (5) years or be fined not less than three thousand dollars ($3,000) nor more than five thousand dollars ($5,000), or both, and for each subsequent offense shall be con-

fined in the penitentiary for not less than five (5) nor more than ten (10) years or be fined not less than five thousand dollars ($5,000) nor more than ten thousand dollars ($10,000), or both.

STATEMENT OF THE CASE

As permitted by Rule 34 of the Supreme Court of the United States the Commonwealth accepts the substantial portion of petitioner's statement of the case but would add the following:

1. Detective Richard R. Hise testified at trial that on November 28, 1979 he had gone to petitioner's house and attempted to buy some preludins. According to Detective Hise's testimony, he was told by petitioner, "Well, I don't have any for sale right now." Petitioner also told Detective Hise, in response to his statement that he might try to purchase preludins elsewhere, "No, well, if you don't do any good, well, come back tomorrow."

2. Detective Gary Epperson testified at trial that the preludins found in petitioner's home on November 28, 1979 were found in a metal drawer in the kitchen wrapped in metal foil, rather than being contained in a prescription vial.

3. Detective Gary Epperson testified that on January 3, 1980, a foil containing five preludins was found on the floor next to where petitioner was sitting at the kitchen table.

4. It was stipulated at trial that petitioner lived at the house searched on November 28, 1979 and January 3, 1980.

REASONS FOR DENYING REVIEW

Although petitioner seeks Supreme Court review of her conviction she fails to show that the state courts of Kentucky either decided a federal question of substance not heretofore determined by this Court or decided a federal question of substance in a way not in accord with applicable decisions of this Court. (United States Supreme Court Rule 19). Neither has petitioner shown that the decisions of the Kentucky State Appellate Courts will have adverse consequences for other litigants or in other situations. Nor has petitioner explained why it is vital that the questions involved be decided finally by this Court.

The reasons advanced by petitioner for this Court granting review are:

1. That the penalty enhancement portion of her trial should have been conducted separately from the trial in chief;

2. That her conviction was based on insufficient evidence; and

3. That the evidence used against her should have been suppressed.

Petitioner's argument on each of the above issues is that the courts of Kentucky erred in deciding the issue; that and nothing more. Petitioner neither points

to the existence of a conflict, nor raises an important question that would call for this Court to exercise its supervisory power. Petitioner alleges only that the courts below erred. The Commonwealth submits that even if petitioner's arguments were successful in demonstrating that the decisions below were erroneous, petitioner would not have successfuly met her burden of showing why review should be granted. Certiorari should only be granted when it is demonstrated that it is important for this Court to review a decision. Petitioner has failed totally to demonstrate the importance of Supreme Court review. For these reasons review should not be granted.

ARGUMENT

1. Petitioner first argues that she was denied due process by the trial court's refusal to bifurcate the penalty enhancement portion of her trial from the trial in chief. In support of her argument petitioner advances as legal authority only her firm belief that the persistent felony offender bifurcated procedure ought to be employed in enhanced drug cases as well in order that she receive due process, i.e. a fair trial.

The Commonwealth contends that the non-bifurcated trial procedure did not violate petitioner's constitutional right to a fair trial.

Petitioner's argument relies heavily on the fact that under the Persistent Felony Offender statute (KRS 532.080) which became effective January 1, 1975, a defendant is entitled to a separate proceeding

on the persistent felony offender charge following conviction on the primary charge. However, there is no provision for a separate proceeding under the subsequent offender provisions of KRS 218A.990.

Before the advent of the Kentucky Penal Code in 1975, it was customary in the trial of habitual criminal indictments to introduce the prior convictions along with the evidence on which the prosecution relied for a conviction on the primary charge, as is the current practice under KRS 218A.990. This procedure was often attacked on constitutional grounds, but its constitutionality was continually upheld, notwithstanding the fact that the procedure was eventually changed by the adoption of the new Penal Code. See *Wilson* v. *Commonwealth,* Ky., 476 S. W. 2d 622, at 624 (1971) wherein the court stated: "This argument has been repeatedly advanced by those convicted as habitual criminals and has been repeatedly rejected by the Court." See also *Cole* v. *Commonwealth,* Ky., 553 S. W. 2d 468, 471 (1977); *Murray* v. *Commonwealth,* Ky., 474 S. W. 2d 359, 360 (1971); and *Thomas* v. *Commonwealth,* Ky., 412 S. W. 2d 578, 579 (1967).

This Court has likewise held in *Spencer* v. *Texas,* 385 U. S. 554, 17 L. Ed. 2d 606, 87 S. Ct. 648 (1967) that non-bifurcated trials in habitual criminal cases are not constitutionally required. In so holding, this Court stated:

> To say that the two-stage jury trial on the English-Connecticut style is probably the fairest, as some commentators and courts have suggested, and with

> which we might well agree were the matter before us in a legislative or rule-making context, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment. *Id.* at 567-568, 616.

Thus, the bifurcated trial granted under the current Persistent Felony Offender statute is not constitutionally required under either state or federal law.

By analogy, the Commonwealth submits that a bifurcated trial is also not constitutionally required under the subsequent offender provisions of KRS 218A.990. Therefore, the non-bifurcated trial procedure did not violate petitioner's constitutional right to due process or a fair trial and neither reversal nor a new trial are called for.

2. Petitioner's second argument is that she was convicted of trafficking in a controlled substance on insufficient proof.

In the case at bar, there was clearly evidence enough to establish by strong inference that petitioner had knowledge, and thus constructive possession, of the controlled substances found in her apartment. It was stipulated at trial that the house searched on those dates was the house in which petitioner lived. On November 28, 1979, the preludins seized were found in a metal drawer in petitioner's kitchen. Of the preludins seized on January 3, 1980, five were found on the floor next to where petitioner was seated and forty-five preludins were found in a sock, hidden in a bag of potatoes on petitioner's porch.

In addition to showing constructive possession of the preludins, the evidence presented also tended to show petitioner's guilt of the crime of trafficking. Detective Hise testified that when he tried to buy preludins from petitioner he was told by petitioner, "Well, I don't have any for sale right now." Detective Hise also testified that petitioner told him, "No, well, if you don't do any good, well, come back tomorrow." These statements further tended to show petitioner's involvement in trafficking.

The Commonwealth submits, therefore, that petitioner's constructive possession of preludins, petitioner's statements tending to show her involvement in trafficking, and the quantity of controlled substances found provided sufficient evidence to sustain petitioner's conviction.

3. Petitioner's final argument is that the evidence used against her should have been suppressed because the police affidavits involved failed to establish probable cause for the issuance of the search warrant used.

Petitioner attacks the affidavit for the 28 November, 1979 search warrant and claims: (1) that the informant did not specify a street address, (2) that the information that a criminal act was committed by a woman named Helen at her residence was insufficient to support the issuance of a search warrant and (3) that there was no proof that the Helen referred to by the informant was the same Helen living at 217 North Western Parkway.

The Commonwealth submits that the affidavit of November 28, 1979 provided the necessary probable cause for the issuance of a search warrant.

It is well settled that an affidavit for a search warrant is sufficient if it contains facts which would give a reasonably discreet and prudent person probable cause for believing that an offense has been committed and that incriminating objects might be obtained under the search.

An examination of the affidavit in question shows that on November 28, 1979 the affiant received information from a reliable confidential police informant, whom affiant knew to be a truthful and reliable individual who feared for his life and personal safety and wished to remain anonymous, and whose effectiveness as a police informant would be destroyed if his identity were to be revealed. The informant stated that during the last 36 hours he had been at the Jefferson County residence of a black female known to the informant as Helen and that while at that residence the informant observed Helen with a large quantity of preludins which she was offering for sale. Affiant stated that he knew the informant to be a truthful and reliable individual, because during the last year the informant had furnished information that had lead to the arrest and conviction of at least 6 individuals, all of which dealt with the sale and possession of controlled substance. The affidavit further shows that through independent investigation the affiant received other information that a large quantity of drugs was being sold by a black female named Helen at 217 North Western Park-

way and that a check of the city and county directory showed that a Helen Bailey lived at 217 North Western Parkway.

This Court has announced that affidavits for search warrants must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion, and that technical requirements of elaborate specificity have no proper place in the area. *United States* v. *Ventresca,* 380 U. S. 102 (1965). Surely, given this approach, the affidavit here would give any reasonably discreet and prudent person probable cause to believe that an offense had been committed and that incriminating objects might be found. The fact that the informant did not specify a street address is of no consequence, since the officer submitting the affidavit ascertained the specific address through independent investigation and indicated the address on the affidavit. Also, the informant's information, combined with the police officer's independent investigation, provided probable cause to believe that the Helen referred to by the informer was the same Helen living at 217 North Western Parkway.

CONCLUSION

Since petitioners have failed to demonstrate why review should be granted, the Commonwealth respectfully requests that this petition be dismissed.

Respectfully submitted,

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[Ms. Leeco for Service, United States Supreme Court Rule 33.2(f)]

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CERTIFICATE OF SERVICE

I, K. Gail Leeco, Assistant Attorney General for the Commonwealth of Kentucky and Member of the Bar of the United States Supreme Court, certify pursuant to UNITED STATES SUPREME COURT RULE 28.5(b) that one copy (typewritten document, see UNITED STATES SUPREME COURT RULE 28.3) of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI, as well as the Appendix to that Response, was served on Hon. John Tim McCall, 200 Hart Block Building, 730 W. Main Street, Louisville, Kentucky 40202, Counsel for Petitioner, by depositing copy of same in the United States Mail, duly addressed and stamped, on this, the 19th day of February, 1982.

K. Gail Leeco

K. GAIL LEECO

Assistant Attorney General for the Commonwealth of Kentucky and Member of the Bar of the United States Supreme Court